44753 SERVICE DATE – DECEMBER 21, 2015
EB

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL & PETROCHEMICALS MANUFACTURERS; THE CHLORINE INSTITUTE; THE FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; AND CARGILL INCORPORATED
v.
UNION PACIFIC RAILROAD COMPANY

Digest:[1] This decision denies a motion filed by Union Pacific Railroad Company to dismiss or make more definite an unreasonable practice complaint filed by the North America Freight Car Association and other associations and individual complainants.

Decided: December 16, 2015

On June 2, 2015, North America Freight Car Association, American Fuel & Petrochemicals Manufacturers, The Chlorine Institute, Inc., The Fertilizer Institute, and American Chemistry Council (Association Complainants), along with Ethanol Products, LLC d/b/a POET Ethanol Products, POET Nutrition, Inc., and Cargill Incorporated (Individual Complainants), filed an amended complaint against Union Pacific Railroad Company (UP) pursuant to 49 U.S.C. §§ 10702, 11101, 11121, 11122, 11701, and 11704, and 49 C.F.R. pt. 1111.[2] In Count I, Complainants challenge the reasonableness of UP Tariff 6004, Item 55-C (Item 55-C), which became effective on January 1, 2015. Complainants allege that Item 55-C "shifts the costs of transporting empty tank cars to and from repair facilities from UP to the providers of private tank cars, including Association Complainants' members and the Individual Complainants, without compensating them for UP's use of their cars." (Amended Complaint 6, June 2, 2015.) Complainants assert that Item 55-C "is (a) an unreasonable practice in violation

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] Collectively, the Association Complainants and Individual Complainants are referred to as "Complainants." According to the complaint, the Individual Complainants are members of one or more of the Association Complainants, but are referred to as Individual Complainants because they also seek particularized relief. (Complaint 5 n.1, Mar. 31, 2015.)

of 49 U.S.C. § 10702, and (b) a violation of UP's statutory obligation to compensate private car owners for the use of their tank cars set forth in 49 U.S.C. § 11122(b)." (Id. at 8.) In Count II, Complainants allege that "UP's refusal to compensate Association Complainants' members and the Individual Complainants for such use, whether through mileage allowances or reduced line haul rates, constitutes an unreasonable practice under 49 U.S.C. § 10702, and is a violation of 49 U.S.C. §§ 11101, 11121, and 11122." (Id. at 9.) On June 22, 2015, UP filed its answer to the amended complaint.[3]

In a separate motion filed on June 22, 2015, UP moved to dismiss the amended complaint or make that complaint more definite.[4] On July 10, 2015, Complainants filed a reply, arguing that UP has not met the Board's standard for a motion to dismiss and that there is no basis for requiring the amended complaint to be made more definite; therefore, they argue that UP's motion should be denied. (Complainants Reply 1, July 10, 2015.)[5]

Motion to Dismiss Amended Complaint in its Entirety. The Board may dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. See Garden Spot & N. Ltd. P'ship—Purchase & Operate—Ind. R.R. Line Between Newton & Browns, Ill., FD 31593, slip op. at 1 (ICC served Jan. 5, 1993). While reviewing a motion to dismiss, the Board will view the alleged facts in a light favorable to the complainant. Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

UP argues that the challenged practices are manifestly lawful and that as a result, Complainants have failed to state a claim upon which relief can be granted. (UP Mot. 1-2, 8-10, Apr. 20, 2015.) Specifically, UP argues that Board precedent establishes that railroads may adopt charges for tank car moves to and from repair facilities and that Board precedent establishes that railroads are not obligated to pay mileage allowances when they charge zero-mileage rates. (Id. at 2, 9-10, 12.) In support of its arguments, UP relies on three ICC decisions: General American Transportation Corp. v. Indiana Harbor Belt Railroad (IHB-II), 3 I.C.C.2d 599 (1987) and Charges for Movement of Empty Cars, Buffalo & Pittsburgh Railroad (Buffalo & Pittsburgh), 7 I.C.C.2d 18 (1990), which addressed tariff charges for empty moves to and from

[3] The amended complaint modifies the original complaint, filed on March 31, 2015, by dropping a request for reparations and damages by the Association Complainants on behalf of their members. It also modifies paragraph 26 of the original complaint to reflect Complainants' assertion that UP previously provided the transportation services covered by Item 55-C without charging a line haul rate. (Amended Complaint Cover Letter, 8, June 2, 2015; Complainants Reply 20, June 1, 2015.)

[4] Because this motion incorporates by reference the arguments UP made in an earlier motion to dismiss or make more definite the original complaint, this decision will cite to UP's earlier motion filed on April 20, 2015, when discussing UP's arguments.

[5] Because this reply incorporates by reference the arguments Complainants made in their earlier reply to UP's motion to dismiss the original complaint, this decision will cite to Complainants' earlier reply filed on June 1, 2015, when discussing Complainants' arguments.

repair shops, and LO Shippers Action Committee v. Aberdeen & Rockfish Railway, 4 I.C.C.2d 1 (1987), which addressed mileage allowances and rate differentials in the context of grain cars.

Complainants argue that UP does not meet the high threshold for granting a motion to dismiss. (Complainants Reply 5, June 1, 2015.) In support of this argument, Complainants state that when the amended complaint is viewed in the light most favorable to them, UP has violated 49 U.S.C. §§ 11121, 11122, and 10702 by not compensating private owners of rail tank cars for transportation with either mileage allowances or through discounted line-haul rates. (Id.) Complainants argue that while UP claims that it offers appropriate zero-allowance rates in lieu of paying mileage allowances, this defense requires development of facts through discovery and the presentation of evidence. (Id.)

In response to UP's claim that the amended complaint is barred by Board precedent, Complainants argue that IHB-II and Buffalo & Pittsburgh are over 25 years old and were based on specific facts regarding the state of the industry at that time. (Id. at 6.) Complainants argue that neither IHB-II nor Buffalo & Pittsburgh reaches the underlying issues of this complaint, and therefore, that these decisions do not provide a sufficient basis on which to dismiss. (Id. at 6-7.) Moreover, Complainants argue that, even assuming that UP's use of zero-mileage rates in place of mileage allowances is consistent with IHB-II, the Board can reevaluate the relevance of that precedent in the context of today's rail marketplace. (Id. at 14.) With respect to LO Shippers, Complainants argue that the case does not address the rail tank car industry, and as a result, it is necessary to present evidence regarding the applicable industry conditions. (Complainants Reply 15-16, June 1, 2015.)

The amended complaint raises allegations that form a reasonable basis for investigation and action. The record shows that there is a significant underlying dispute regarding the rate and method of compensation for the use of privately owned or leased tank cars (i.e., the use of zero mileage rates instead of mileage allowances). Moreover, there is a significant dispute regarding the charges assessed for moves to and from repair facilities under Item 55-C and whether or not car owners or lessees should be compensated for such moves. While UP argues that the challenged practices are lawful under Board precedent, Complainants question whether UP is complying with that precedent and whether that precedent is applicable here. Such arguments are fact-specific and, as such, can only be sufficiently addressed after the development of a full record. In addition, Complainants argue that even if that precedent applies to the facts here, the Board should consider whether that precedent should stand given changes in the railroad industry, an issue that also has not been fully briefed. For these reasons, UP's motion to dismiss the amended complaint in its entirety will be denied.

Motion to Dismiss Contract Claims. UP also argues that if both counts of the amended complaint are not dismissed in their entirety, the Board should dismiss any claims in those counts relating to transportation provided under contract. (UP Mot. 2, 17-18, Apr. 20, 2015.) UP notes that Complainants do not expressly limit the scope of the amended complaint to transportation conducted under common carrier rates; rather, they seek a "Board order that would apply to all shipments in private tank cars." (Id. at 17 (citing Complaint 10, Mar. 31, 2015).) UP states that the Board could not issue such an order as it is well settled that transportation provided under contract is not subject to the Board's jurisdiction. (UP Mot. 17, Apr. 20, 2015 (citing 49 U.S.C.

§ 10709(c)(1)).) Therefore, UP argues, the Board has no jurisdiction to prohibit UP from incorporating Item 55-C into contracts or prohibit UP from entering into contracts that do not include a mileage allowance. (UP Mot. 18, Apr. 20, 2015.)

Complainants argue that they do not ask the Board to assert jurisdiction over transportation moving pursuant to a contract. (Complainants Reply 16, June 1, 2015.) Rather, they argue that "whether or not UP's tank car compensation practices are reasonable is a matter entirely separate and independent from whether the tank car is used in connection with a transportation contract or a tariff, and it is well within the Board's jurisdiction." (Id. at 17.) Complainants argue that UP's contract movements argument is predicated on the unsupported assertion that empty tank car movements are governed by contracts. (Id.) Moreover, Complainants contend that UP's contract argument is deficient in that it fails to account for situations where the tank car owner is not a party to the transportation contract (e.g., when a shipper leases a tank car from a third party owner) or when a contract is for the movement of a specific commodity, and thus the movement to the repair facility is outside the scope of the contract. (Id. at 18-19.)

It is well settled that the Board's authority does not extend to those movements conducted pursuant to transportation contracts. 49 U.S.C. § 10709(c)(1); H. B. Fuller Co. v. S. Pac. Transp. Co., 2 S.T.B. 550, 553 (1997). We note that the parties may not agree on what constitutes contract traffic as opposed to tariff traffic. (See, e.g., Complainants Reply 18-19, June 1, 2015 (addressing a situation in which Complainants allege that the movement to the repair facility is not a contract movement because it is outside the scope of any contract)). Additional briefing and a more developed record could be helpful to resolving the issue. Accordingly, UP's request that we dismiss these claims will be denied. However, to provide guidance to the parties, we confirm that complainants may challenge the application of a practice to tariff movements, even if the same practice also appears in a contract. By the same token, complainants may not challenge before the Board the application of a practice to movements governed by contract, even if the same practice also appears in a tariff. See Rail Fuel Surcharges, EP 661, slip op. at 9 n.34, 13 (STB served Jan. 26, 2007).[6] Therefore, it is unnecessary to further amend the complaint, because any potential remedy would be limited by the scope of the Board's authority.

[6] On October 28, 2015, Complainants filed a petition to "expedite procedure," in which they suggest that bifurcation of the amended complaint may achieve the goal of expediting the Board's ruling on UP's motion to dismiss or make the amended complaint more definite. Complainants argue that Count I and Count II could be bifurcated on the basis of the distinct arguments made in UP's motion to dismiss or make the amended complaint more definite. On October 30, 2015, UP filed a response in opposition to Complainants' petition. On November 19, 2015, Complainants filed a letter reaffirming their request for an expeditious decision on the grounds that UP intends to increase the challenged tariff rates on January 1, 2016. In this decision, the Board is ruling on UP's motion to dismiss or make the amended complaint more definite, and Complainants' petition to expedite procedure will be denied because they have not shown that bifurcating the amended complaint will achieve the goal of expediting this decision or subsequent decisions in this case.

Motion to Make the Complaint More Definite. UP requests that if the Board does not dismiss both counts in their entirety, the Board should require the amended complaint to be made more definite. (UP Mot. 3, 21, Apr. 20, 2015.) With regard to Count I, UP argues that the Board "should require Complainants to make more definite any allegations that they or their members have been improperly charged for movements of empty cars to or from repair facilities in connection with transportation provided under common carrier rates." (Id.) With regard to Count II, UP requests that the Board order Complainants to make the allegations more definite in the following respects:

1. "Make more definite any allegation that UP failed to pay mileage allowance in situations where [Complainants] or their members ship traffic under common carrier rates that are not zero-mileage rates." (Id. at 22.)
2. Make more definite any allegation that "UP refused reasonable requests to establish rates that include a mileage allowance." (Id.)
3. Require Complainants "to identify the specific rates, routes, tank car types, car ownership costs, and car ownership conditions as to which they allege that UP is not adequately compensating them or their members for supplying tank cars." (Id. at 3, 22.)

Complainants argue that there is no basis for requiring the amended complaint to be made more definite. (Complainants Reply 20, June 1, 2015.) Complainants state that "the motion must be denied if the movant is fully aware of the issues and basic facts involved." (Id. (citing United States v. Seigle's Express, Inc., MC-C-30132, slip op. at 1 (ICC served Jan. 5, 1989)).) Complainants argue that the information and facts sought in UP's request "are more appropriately elicited through discovery." (Complainants Reply 21, June 1, 2015.)

Under 49 C.F.R. § 1111.1(a), a complaint must set forth briefly the facts upon which it is based. A complaint must also include specific reference to pertinent statutory provisions and Board regulations, and should advise the Board and the defendant fully in what respects these provisions or regulations have been violated. Complainants have met their burden, as outlined in 49 C.F.R. § 1111.1(a), regarding the sufficiency of the complaint. The amended complaint alleges that UP has violated 49 U.S.C. §§ 11121, 11122, and 10702 by adopting Item 55-C and by not compensating parties who provide privately owned or leased tank cars through mileage allowances or through reduced line-haul rates. In its current form, the amended complaint informs both the Board and UP of the underlying facts that have given rise to the complaint, and it identifies, with specificity, both the statutory provisions and the manner in which Complainants believe UP has violated those provisions. Therefore, the Board finds that the amended complaint is sufficient to meet the requirements of 49 C.F.R. § 1111.1(a), and, as a result, UP's motion to make the complaint more definite will be denied. While UP's motion is denied, the Board does believe that information sought in the motion to make the amended complaint more definite is relevant to the proceeding and the underlying issues. The Board concludes that UP seeks information more appropriately obtained in discovery.

Procedural Schedule. On September 28, 2015, the parties submitted a third status report indicating that, although the parties had met and conferred to discuss discovery issues and the

possibility of jointly submitting a procedural schedule, they were unable at that time to jointly propose a procedural schedule due to the uncertainty arising from UP's motion to dismiss. In light of this decision, the parties are directed to meet and confer and to submit (either jointly or individually) a proposed procedural schedule by January 4, 2016.

It is ordered:

1. UP's motion to dismiss the amended complaint or make the complaint more definite is denied.

2. Complainants' petition to expedite procedure is denied.

3. The parties are directed to meet and confer and to submit (either jointly or individually) a proposed procedural schedule by January 4, 2016.

4. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.